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Steamfitters Local Union No. 342 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO (Contra Costa Electric, Inc.) *and* Joe Jacoby. Case 32–CB–4435

September 28, 2001

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN, TRUESDALE, AND WALSH

On September 30, 1999, the National Labor Relations Board issued its Decision and Order in the above-captioned case. 329 NLRB 688. The Board found that the Respondent Union's negligent failure to refer Charging Party Joe Jacoby to a job in the proper order from its exclusive hiring hall did not violate its duty of fair representation and Section 8(b)(1)(A) and (2) of the Act.

In reaching that conclusion, the Board relied on the Supreme Court's decisions in *Steelworkers v. Rawson*, 495 U.S. 362 (1990), and *Air Line Pilots Assn. v. O'Neill*, 499 U.S. 65 (1991). In *Rawson*, the Court reiterated that a union breaches its duty of fair representation only by conduct that is "arbitrary, discriminatory, or in bad faith." 495 U.S. at 190, citing *Vaca v. Sipes*, 386 U.S. 171 (1967). The Court also held that mere negligence does not violate the duty. 495 U.S. at 361–362. In *O'Neill*, the Court held that the "arbitrary, discriminatory, or in bad faith" standard applies to all union activity, 499 U.S. at 67, and noted that the duty of fair representation applies to hiring hall operations. Id. at 77. The Board read those decisions together to mean that "mere negligence" in the operation of an exclusive hiring hall does not violate the duty of fair representation. 329 NLRB at 689.[1] The Board also observed that its holding was consistent with earlier Board decisions finding that inadvertent mistakes in the operation of a hiring hall do not violate the duty. See, e.g., *Operating Engineers Local 18 (Ohio Pipe Line)*, 144 NLRB 1365 (1963); *Plumbers & Steamfitters Local 40*, 242 NLRB 1157, 1163 (1979), enfd. mem. 642 F.2d 456 (9th Cir. 1981).

The Board also rejected the General Counsel's contention that the Union's conduct violated Section 8(b)(1)(A) and (2) even if it did not breach the duty of fair representation. The General Counsel noted that the Board had often held that any departure from the established procedures of an exclusive hiring hall that results in the denial of employment is unlawful unless it is justified by either a valid union-security clause or the union's need to perform its representative functions effectively. See, e.g., *Operating Engineers Local 18 (Ohio Contractors Assn.)*, 204 NLRB 681 (1973), remanded on other grounds 496 F.2d 1308 (6th Cir. 1974), on remand 220 NLRB 147 (1975), enf. denied 555 F.2d 552 (6th Cir. 1977). The Board explained that the rationale behind this rule is that any unjustified departure from those procedures inherently encourages union membership by demonstrating to hiring hall users the union's power over their livelihoods. The Board held that this reasoning applies to the volitional acts of union officials, but not to inadvertent failures to follow the rules. Such failures, the Board held, do not indicate to applicants that they must remain in the union's good graces if they wish to receive referrals. 329 NLRB at 691.

The Charging Party petitioned for review in the United States Court of Appeals for the District of Columbia Circuit. On December 12, 2000, the court of appeals reversed and remanded the case to the Board. *Jacoby v. NLRB*, 233 F.3d 611 (D.C. Cir. 2000). The court held that the Board's reading of *Rawson* and *O'Neill* (which were not hiring hall cases) could not be reconciled with the court's earlier holding that the Supreme Court in *O'Neill* did not intend to weaken the standard of review applicable to hiring hall operations. *Plumbers & Pipe Fitters Local 32 v. NLRB*, 50 F.3d 29, 33 (D.C. Cir. 1995). The court also relied on the Supreme Court's statement in *Breininger v. Sheet Metal Workers Local 6*, 493 U.S. 67, 89 (1989), that the imbalance of power and possibilities for abuse in the hiring hall setting were such that "if a union does wield additional power in a hiring hall by assuming the employer's role, its responsibility to exercise that power fairly *increases* rather than *decreases*."[2] The court remanded the case to the Board to determine whether the Union's negligent conduct was an unfair labor practice, in light of what the court found to be "the union's heightened duty of fair dealing in the context of a hiring hall." 233 F.3d at 617.

The court also addressed the Board's holding that the Union's conduct did not violate Section 8(b)(1)(A) and (2) apart from any breach of the duty of fair representation. The court found that, "given the focus of Section 8(b)(2) on discrimination, we cannot fault the Board's view that a purely negligent breach of the rules would

[1] The Board overruled *Iron Workers Local 118 (California Erectors)*, 309 NLRB 808 (1992), and other decisions to the extent they held that even a negligent failure to refer in the correct order violates the duty of fair representation.

[2] The Board had construed the Court's statement as meaning that, when a union operates an exclusive hiring hall, its duty of fair representation expands into additional areas, not that the union is subject to a higher standard of conduct. 329 NLRB at 689–690.

lack the signaling effect that the provision, and the Board, sought to avoid." Id. at 618. The court further noted, however, that the effect of the Board's holding regarding these "independent" violations was to ensure that the Act "imposed no broader liability independent of the duty of fair representation than as construed with that duty." Id. at 619. Thus, in light of its remand on the duty of fair representation issue, the court found it premature to rule on the sufficiency of the Board's second holding. Id.

On March 27, 2001, the Board advised the parties and amici curiae that it had accepted the court's remand and that they might file statements of position with respect to the issues raised by the remand. The General Counsel, the Charging Party, and the Respondent filed position statements, and amici AFL–CIO, Building and Construction Trades Department, AFL–CIO, and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO filed a joint position statement.

Discussion

Having accepted the court's remand, we also accept its opinion as the law of the case. We therefore assume, for purposes of this decision, that *Rawson* and *O'Neill* do not compel a finding that negligence in hiring hall operations does not breach a union's duty of fair representation. We also assume, for purposes of this decision, that a union has a "heightened duty of fair dealing" in the operation of an exclusive hiring hall.[3]

For the reasons discussed below, applying this "heightened duty" standard, we reaffirm the Board's earlier holding that inadvertent mistakes in the operation of an exclusive hiring hall arising from mere negligence do not violate the union's duty of fair representation. We also reaffirm that such mistakes do not violate Section 8(b)(1)(A) and (2). Consistent with the court of appeals' opinion and the law of the case, we reach these conclusions independently of the Supreme Court's statements in *Rawson* and *O'Neill*. Instead, we rely on the Board's decisions prior to *California Erectors*, in which the Board held that inadvertent errors in hiring hall hiring hall operations did not violate the duty of fair representation or Section 8(b)(1)(A) and (2). In our view, those decisions set forth the better view, as both a matter of law and policy. Accordingly, we reaffirm the Board's earlier decision overruling *California Erectors* and other decisions to the extent they are inconsistent with this view.

In so holding, we adhere to the Board's longstanding position that any departure from the established procedures for an exclusive hiring hall that results in denial of employment to an applicant violates the duty of fair representation and Section 8(b)(1)(A) and (2), unless the union can demonstrate that the departure was pursuant to a valid union-security clause or was necessary to the union's effective performance of its representative function. We reaffirm that such departures encourage union membership by signaling the union's power to affect the livelihoods of all hiring hall users, and thus restrain and coerce applicants in the exercise of their Section 7 rights. As indicated above, however, our past decisions have recognized that inadvertent errors in operating a hiring hall do not signal the union's power over referrals and thus do not encourage union membership or restrain and coerce applicants in violation of either the duty of fair representation or Section 8(b)(1)(A) and (2). We return to the view expressed in those cases.

I. A UNION'S INADVERTENT MISTAKE IN OPERATING A HIRING HALL DOES NOT BREACH ITS DUTY OF FAIR REPRESENTATION

The duty of fair representation was a creation of the Federal courts. In *Steele v. Louisville & Nashville Railway Co.*, 323 U.S. 192 (1944), the Supreme Court held that a union's acceptance of authority, under the Railway Labor Act, as the exclusive representative of bargaining unit employees carried with it a correlative duty to exercise its authority fairly. The Court stated that, in collective bargaining and in making contracts, the union was required to represent nonunion or minority union members "without hostile discrimination, fairly, impartially, and in good faith." Id. at 204. The Court extended those principles to the NLRA in *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), holding that a union's authority as the exclusive bargaining representative gives rise to a duty to represent all unit employees fairly. This "statutory obligation to represent all members of an appropriate unit requires [unions] to make an honest effort to serve the interests of all of those members, without hostility to any." Id. at 337.

Nine years later, the Board held that a union's breach of its duty of fair representation constituted an unfair labor practice. *Miranda Fuel Co.*, 140 NLRB 181 (1962), enf. denied 326 F.2d 172 (2d Cir. 1963). The Board majority in *Miranda* based its holding on the union's status as the 9(a) exclusive bargaining representative, and noted court decisions that had inferred a concomitant duty to represent the interests of the entire

[3] Chairman Hurtgen concludes that, as a matter of law and policy, a union has a "heightened duty of fair dealing" in the operation of an exclusive hiring hall.

group fairly, impartially, and in good faith.[4] In light of those obligations and of employees' rights under Section 7 of the Act to bargain collectively through their chosen representatives, the majority held that "Section 7 . . . gives employees the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment." Id. at 185. Accordingly, "Section 8(b)(1)(A) . . . prohibits labor organizations, when acting in a statutory representative capacity, from taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair." Id.[5]

The majority in *Miranda* also held that a union violates Section 8(b)(2) "when, for arbitrary or irrelevant reasons or upon the basis of an unfair classification, [it] attempts to cause or does cause an employer to derogate the employment status of an employee." Id. at 186. The majority recognized that the crucial question is whether such conduct encourages membership in any labor organization, which is a necessary element of an 8(b)(2) violation.[6] The majority held that a violation does not necessarily flow from actions that have the foreseeable result of encouraging union membership, but that, given such a foreseeable result, whether a violation is committed depends on whether the disputed conduct serves legitimate employer or union purposes. The majority concluded that unions are not permitted to affect an employee's employment status for personal, arbitrary, unfair, or capricious reasons, regardless of whether those reasons are related to the employee's union membership or activities. 140 NLRB at 186–188.

In the four decades following *Miranda Fuel*, the Board and the courts have consistently held that the duty of fair representation applies to unions that operate exclusive hiring halls. In its hiring hall decisions, the Board has repeatedly and consistently described the duty of fair representation in terms similar to those employed in *Steele*, *Huffman*, and *Miranda Fuel*. See, for example, *Teamsters Local 519 (Rust Engineering)*, 276 NLRB 898, 908 (1985) (union operating a hiring hall must not conduct itself in an "arbitrary, invidious, or discriminatory manner"); *Boilermakers Local 374 (Combustion Engineering)*, 284 NLRB 1382, 1383 (1987), enfd. 852 F.2d 1353 (D.C. Cir. 1988) (union must operate hiring hall in a "fair and impartial manner," with rules that must not be "discriminatory or arbitrary"); *New York Lithographers Union No. 1-P*, 258 NLRB 1043, 1046 (1981), rev. denied 742 F.2d 1439 (2d Cir. 1983) (union must not base referrals on "arbitrary, hostile, invidious, or capricious considerations," but must act "in good faith and with an honesty of purpose"); *Plumbers & Steamfitters Local 40*, 242 NLRB at 1163 (union must refrain from conduct motivated by "hostile, invidious, irrelevant, or unfair considerations").

Reviewing courts have done likewise. See, e.g., *Operating Engineers Local 406 v. NLRB*, 701 F.2d 504, 508 (5th Cir. 1983) (union must not use "arbitrary or invidious" criteria in referrals); *NLRB v. Iron Workers Local 433*, 600 F.2d 770, 777 (9th Cir. 1979) (unlawful for bargaining representative to act in an "unreasonable, arbitrary, or invidious manner" with regard to an employee's employment status); *Electrical Workers IBEW Local 948 v. NLRB*, 697 F.2d 113, 116 (6th Cir. 1982) (union does not commit unfair labor practice unless it administers exclusive hiring hall in "discriminatory or arbitrary" manner); *Boilermakers Local 374 v. NLRB*, 852 F.2d 1353, 1358 (D.C. Cir. 1988) (unlawful for union to administer exclusive hiring hall "arbitrarily or without reference to objective criteria" and thereby to affect employment status of employees it represents; union is held to "high standard of fair dealing"). Indeed, although the Supreme Court in *Breininger* stated that in the hiring hall setting, a union's "responsibility to exercise [its] power fairly *increases* rather than *decreases*," 495 U.S. at 89, it also said that the union's authority over referrals must be exercised "in a nonarbitrary and nondiscriminatory fashion." Id. at 88.

The descriptive terms used to describe breaches of the duty—"arbitrary," "invidious," "discriminatory," "hostile," "unreasonable," "capricious," "irrelevant or unfair considerations," without "honesty of purpose"—indicate deliberate conduct that is intended to harm or disadvantage hiring hall applicants. They all imply that the union is either using its power to control referrals against the interests of individual applicants or classes of applicants, or that it may do so at any time, at its discretion.

There is nothing in those descriptions, however, to suggest that a union must operate an exclusive hiring hall mistake-free. An inadvertent failure to dispatch a hiring hall applicant in the proper order by definition is not de-

[4] 140 NLRB at 184, citing *Wallace Corporation v. NLRB*, 323 U.S. 248, 255 (1944) (as representative of all employees, union is "charged with the responsibility of representing their interests fairly and impartially); and *Hughes Tool Co. v. NLRB*, 147 F.2d 69, 74 (5th Cir. 1945) (as bargaining agent for the group, union "became bound to represent equally and in good faith the interests of the whole group").

[5] Sec. 8(b)(1)(A) makes it an unfair labor practice for a union to "restrain or coerce employees in the exercise of the rights guaranteed in section 7[.]"

[6] Sec. 8(b)(2), in relevant part, makes it an unfair labor practice for a union to "cause or attempt to cause an employer to discriminate against an employee in violation of [Sec. 8(a)(3)]." Sec. 8(a)(3) provides, in relevant part, that it is an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization[.]"

liberate and can hardly be described as "arbitrary," "invidious," "hostile," or any of the other adjectives repeatedly used to characterize unfair representation. It carries no suggestion that the union has any thought or intention of acting to an applicant's disadvantage. It may signal an error in judgment, but not favoritism or hostility.

For this reason, the Board's decisions initially held that inadvertent mistakes or errors in judgment in hiring hall operations did not violate the duty of fair representation. Thus, for example, in *Operating Engineers Local 18 (Ohio Pipe Line)*, supra, the union business agent, mistakenly believing that an applicant had been reregistered, failed to reregister him, thus making him ineligible for referrals. The Board found that the failure to reregister the applicant was not discriminatorily motivated or prompted by "unfair or irrelevant or invidious" reasons. 144 NLRB at 1367. Accordingly, the Board found that the union had not violated its duty of fair representation, since "[m]ere forgetfulness or inadvertent error is not the type of conduct that the principles of *Miranda* were intended to reach." Id. at 1368.

The Board reached a similar conclusion in *Plumbers and Steamfitters Local 40*, supra. There, the union business agent dispatched an applicant to a job for which he was qualified, and for which he deemed the other registered applicants to be unqualified. The Board agreed with the administrative law judge that, even if the business agent had underestimated the qualifications of the other applicants, there was no showing of favoritism or an attempt to discriminate. It therefore adopted his finding that the agent's conduct was not shown to have been motivated by "hostile, invidious, irrelevant, or unfair considerations," but instead was no more than "a judgment which, while possibly erroneous or mistaken, was not arbitrary" or unlawful. 242 NLRB at 1163.[7]

We think that *Ohio Pipe Line* and *Plumbers Local 40* reflect the correct view of the duty of fair representation.[8] As discussed above, there is nothing about making an inadvertent error in the referral process that is in any way deliberate or indicative of an intention to harm an applicant or to deprive him of representation. A union's simple negligence in administering a hiring hall does not implicate the concerns that animate the duty of fair representation.[9]

Moreover, in operating hiring halls, unions perform a valuable service for employers as well as employees. If we were to find that unions have a duty to perform that service free of all errors, we might well discourage unions from undertaking that worthwhile role. As a matter of sound public policy, then, we are unwilling to infer that the duty of fair representation admits of no mistakes in the hiring hall context.

As indicated above, we reach this conclusion even applying the court of appeals' holding that, in hiring hall operations, a union has a "heightened duty of fair dealing." The court did not imply that, under the heightened-duty standard, a union could not make a simple mistake in referrals from an exclusive hiring hall. Nor, for the reasons discussed above, do we think so. However heightened the duty, we do not believe it reaches so high.

II. A UNION'S INADVERTENT MISTAKE IN OPERATING A HIRING HALL ALSO DOES NOT VIOLATE SECTION 8(b)(1)(A) AND (2).

As indicated above, the General Counsel argued that, even if negligent errors in referrals do not breach the duty of fair representation, they are nonetheless unlawful. The Board in its original decision rejected that contention. We reaffirm that holding today, essentially for the same reasons discussed above.

The Board has long held that any departure from established hiring hall procedures that leads to denial of employment inherently encourages union membership and violates Section 8(b)(1)(A) and (2), unless it is based on a valid union-security clause or is necessary to the effective performance of the union's representative function. *Operating Engineers Local 18 (Ohio Contractors Assn.)*, 204 NLRB at 681.[10] On its face, this rule could be read to encompass simple mistakes. However, as explained in the Board's earlier decision, the rationale for the rule is that deliberate, volitional departures from established hiring hall procedures encourage union membership. They signal to employees that, no matter what the hiring hall rules say, the union can do as it wishes in making referrals, and thus that union considerations may play a part in determining who receives favorable treatment in referrals. 329 NLRB at 691. As the Board further explained, however, that rationale cannot reasonably be applied to simple mistakes in the referral process:

[7] See also *Boilermakers Local 374 (Combustion Engineering)*, supra, 284 NLRB at 1383: "To support a finding of arbitrariness 'something more than mere negligence or the exercise of poor judgment on the part of the Union must be shown.'" (Citation omitted.)

[8] Both *Ohio Pipe Line* and *Plumbers Local 40* were decided well before *Rawson* and *O'Neill*. The Board's holdings thus were completely independent of the Supreme Court's statements in those cases.

[9] The situation would be different, of course, if the operation of the hiring hall were so faulty that *gross* negligence was established. In such circumstances, the union's conduct demonstrates that it is deliberately or recklessly indifferent to employees' interests—the equivalent of hostility or arbitrariness.

[10] When the General Counsel shows that a union has departed from established hiring hall procedures, a violation is established unless the union comes forward with rebuttal evidence that the departure was justified. The overall burden of persuasion remains with the General Counsel. *Operating Engineers Local 450*, 267 NLRB 775, 795 (1983).

> When, as in this case, a union officer in charge of referrals intends to follow the prescribed procedures and thinks that he has done so, his inadvertent failure to do so, even to the detriment of an applicant, simply does not carry the message that applicants had better stay in the good graces of the union if they want to ensure fair treatment in referrals. . . . [M]ere negligence does not constitute a display of "union power" which would carry a coercive message that could reasonably be thought to encourage union membership. Id.

Because it found that such mistakes do not encourage (or discourage) union membership, the Board concluded they do not violate Section 8(b)(2) or restrain or coerce employees in violation of Section 8(b)(1)(A).

The Board's holding was consistent with previous decisions. Thus, in *Plumbers Local 520 (Aycock Inc.)*, 282 NLRB 1228, 1232 (1987), the Board held that a union that mistakenly placed an applicant's name at bottom of its referral list did not violate Section 8(b)(1)(A) and (2), even though the union's error cost the applicant a referral. In *IATSE Local 592 (Saratoga Performing Arts Center)*, 266 NLRB 703, 710 (1983), the Board found that although the union representative's sloppy and unbusinesslike operation of an exclusive hiring hall led to mistakes in referrals, it did not violate Section 8(b)(1)(A) and (2). In neither case was the duty of fair representation discussed, and thus both clearly support the view that simple mistakes do not independently violate Section 8(b)(1)(A) and (2) apart from the duty of fair representation.

Accordingly, for all the foregoing reasons, we reaffirm the Board's earlier holding that a union's inadvertent mistake in operating a hiring hall arising from mere negligence also does not violate Section 8(b)(1)(A) and (2), independent of the duty of fair representation.[11]

III. IN CASES INVOLVING A UNION'S INADVERTENT MISTAKE IN OPERATING A HIRING HALL, THE STANDARD FOR FINDING A VIOLATION OF SECTION 8(b)(1)(A) AND (2) DOES NOT DEPEND ON WHETHER A BREACH OF THE DUTY OF FAIR REPRESENTATION IS ALSO ALLEGED

Finally, we wish to clarify our holding in response to certain observations made by the court of appeals. Because the Board overruled *California Erectors*, a duty of fair representation case, but did not overrule any decisions in which a breach of the duty of fair representation was not alleged, the court apparently inferred that the Board might apply different standards in determining whether a negligent failure to abide by hiring hall procedures violated the Act, depending on whether a violation of the duty of fair representation was alleged. 233 F.3d at 618.[12]

If that was the court's impression, we wish to correct it. In such cases, the Board has applied and will continue to apply the same standards, regardless of whether a breach of the duty of fair representation is alleged.Except for *California Erectors*, which we have overruled, the Board has consistently declined to find that simple mistakes or errors in judgment in hiring hall operations violated the Act, both when a breach of the duty of fair representation was alleged (*Ohio Pipe Line; Plumbers Local 40)* and when it was not (*Plumbers Local 520 (Aycock Inc.); IATSE Local 592*).[13]

Conclusion

For the foregoing reasons, we reaffirm the Board's holding that the Union did not breach its duty of fair representation or violate Section 8(b)(1)(A) and (2) by negligently failing to refer Jacoby in the proper order, and we reaffirm its dismissal of the complaint.[14]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. September 28, 2001

Peter J. Hurtgen,	Chairman
Wilma B. Liebman,	Member
John C. Truesdale,	Member
Dennis P. Walsh,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[11] We therefore also reaffirm that *California Erectors*, and other decisions suggesting that inadvertent errors in the operation of an exclusive hiring hall violate the duty or the Act, are overruled.

[12] The court of appeals observed: "Given that the underlying theory in *California Erectors* (which the Board does explicitly overrule) and other duty of fair representation cases is that breaches of the duty are themselves violations of Sections 8(b)(1)(A) and (2) . . . the Board in essence argues that the standard for judging violations of the same statutory provisions may depend upon whether or not a complaint or ruling specifically invokes the magic words "duty of fair representation." Id.

[13] The court of appeals observed that, "The Board does not cite, and we have been unable to find, any evidence that in hiring hall cases the Board has ever applied different *standards* depending on whether the complaint invoked the duty of fair representation or not." 233 F.3d at 618. Nor are we aware of any such decisions.

[14] The Charging Party contends that the Union's failure to refer him properly was anything but inadvertent. He notes that, because of an unusually high volume of referral activity, the Union delegated part of the responsibility for dispatches to inexperienced staff. The Charging Party argues that, in those circumstances, mistakes were foreseeable and even volitional. We find no merit in this contention. The person who made the mistake in not referring Jacoby was the business agent himself, not one of the inexperienced staff.